For myself I would allow the appeal by reducing the amount of damages from $2,000 to $86 with costs in this court. Each party is to pay his own costs in the High Court.

MacIntyre J.: I have had the advantage of reading the judgment of the Lord President and I am in entire agreement with it.

Azmi C.J. (Malaya) concurred.

Appeal allowed. Damages reduced.

Solicitors: *Rithauddeen & Aziz; Oorjitham & Lam.*

PUBLIC PROSECUTOR v. LOH KENG KOH

[A.C.J. (Chang Min Tat J.) September 5, 1966]

[Ipoh — Perak Criminal Appeal No. 8 of 1966]

Criminal Law and Procedure — Trial — Prosecution offering witness to defence — Witnesses called by defence — Prosecution not allowed to cross-examine witnesses — Miscarriage of justice.

The accused had been charged for offences relating to the use of a vehicle as a public service vehicle. At the close of the prosecution the prosecuting officer offered certain witnesses, who were passengers in the vehicle, to the defence. Some of these witnesses were called by the defence and the prosecution applied to cross-examine them. The learned magistrate refused to allow the prosecution to do so and he acquitted and discharged the respondent.

Held: there was no justification in this case for excluding the right of the prosecution to examine witnesses for the defence; the exclusion of such examination had caused a miscarriage of justice and the order for acquittal must be set aside and a retrial ordered.

[Editorial Note: Reference may be made to *R.* v. *Sanmugam & Anor.* [1932] M.L.J.; [1933] S.S.L.R. 337 where Whitley J. held: "In a trial by jury the prosecuting officer is not bound to call as a witness for the Crown or tender for cross-examination a witness who gave evidence in the preliminary inquiry whose evidence in his opinion is unnecessary, hostile, or not believed. But such witness must be in attendance. If the accused or his counsel wishes to have such witness called when not called by the Crown, then the witness becomes his witness and the prosecuting officer will have the right of cross-examination."]

Cases referred to:—

(1) *Teh Lee Tong* v. *R.* [1956] M.L.J. 194.

(2) *R.* v. *O'Connell* (1844), 7 Ir. L.R. 261 at p. 312, 313.

MAGISTRATE'S CRIMINAL APPEAL.

Idris bin Yusoff (Deputy Public Prosecutor) for the appellant.

E. K. Yeap for the respondent.

Cur. Adv. Vult.

Chang Min Tat J.: In this appeal, the public prosecutor appealed against the acquittal of the respondent by the learned magistrate sitting at Bruas, Perak, on three charges connected with his operation of a motor car No. PA 2765.

The charges were that, firstly, on 4th August, 1965, at 3.00 p.m. in Pantai Remis, Perak, he used the said vehicle as a public service vehicle without a valid licence, an offence punishable under section 92(1) of the Road Traffic Ordinance; secondly, without paying the higher fees chargeable for a public service vehicle, an offence punishable under section 22(2) of the Road Traffic Ordinance, and, thirdly, without a valid policy of insurance for such user as a public service vehicle, an offence punishable under section 74(2) of the said Ordinance.

The prosecution relied, as they were perfectly entitled to do, on the evidence of adequate groundwork of the operation of the said car by the respondent from 10th February, 1965 to 4th March, 1965, and on the presumptions under section 144 of the Road Traffic Ordinance. At the close of the case for the prosecution, the prosecuting officer made available for the defence the 5 passengers found by the police to have been carried by the respondent in his car on 4th March, 1965. What the learned magistrate recorded was:—

"The following witnesses: Beh Ah Bee, Yeoh Sin On, Ng Seh Mooi and Lim Sui Tiang — offered to the defence."

I do not think that when the learned magistrate recorded this part of the proceedings there was any possibility of doubt that the prosecution did not propose, as they were again perfectly entitled to do (See *Teh Lee Tong* v. *R.*[1] to call those witnesses for the prosecution or that they were not offering them as witnesses for the prosecution, for cross-examination by the defence. That there is no such doubt is clear by the record made by the learned trial magistrate of the right reserved by the then defence counsel of calling these witnesses, if the defence was called. One should have thought this reservation redundant, but nonetheless defence counsel had his say.

In the events that happened, the defence was called. Respondent gave affirmed evidence and was duly cross-examined and re-examined. The case was then adjourned to another day. At the resumption, respondent changed counsel. His new counsel then proceeded to call 3 of the 5 passengers, the other two being absent from court on that day. The first defence witness, on being affirmed, gave evidence that he obtained a free lift from the respondent on that day and had no intention of paying nor did he pay any fare.

At this point, the record of the proceedings reads as follows:—

"*XXN. by Prosecution*:— (*Sarkar* on Evidence, section 154), page 1218 Defence counsel objects to cross-examination by the prosecution: as the prosecution: merely tenders the witness without his examination. Objection upheld."

On the objection being upheld, there was no cross-examination of the witness. Defence counsel then proceeded to call the other two passengers and without giving the benefit of cross-examination to the prosecution. On this unchallenged evidence for the defence, the learned magistrate then proceeded to hold that the defence had rebutted the presumption under the Road Traffic Ordinance and acquitted and discharged the respondent.

Now, this is a remarkable state of affairs, a state brought about entirely by the submission of defence counsel on the law of evidence. It is no wonder then that the learned public prosecutor should urge as his main grounds of appeal that:—

"(a) The learned magistrate erred in law and in procedure when he refused to allow the prosecutor to cross-examine the witnesses for the defence;

(b) The learned magistrate erred in law when he misinterpreted section 154 of the Evidence Ordinance 1950."

Section 154 of the Evidence Ordinance reads as follows:—

"The court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party."

I stress the words "the person who calls a witness."

This particular section of the Evidence Ordinance, on a proper construction, relaxes the prohibition of putting leading questions to a party's own witness. When a witness, by his conduct and evidence, shows that he is giving or about to give evidence against the party who calls him, then, at the discretion of the court, this party could cross-examine him.

Defence counsel, who appeared for the defence at this stage, relied on the following passage in *Sarkar* on Evidence (10th Edition) page 1218. It reads:—

"Where the prosecution merely tenders witness as 'gained over' without examining him, he cannot be allowed to be cross-examined by the prosecution."

The whole point, however, is, as I should have thought, that it was abundantly clear to even the most myopic, that these 3 passengers were not tendered as witnesses for the prosecution. They were not offered for cross-examination. They were made available to the defence. The defence duly called them as witnesses for the defence. They were heard in examination-in-chief. The right of the defence to cross-examine witnesses for the prosecution is, as I should have thought, as undoubted as the right of the prosetion to cross-examine witnesses for the defence. It is, in fact, laid down in law and in section 138(1) of the Evidence Ordinance:—

"138. (1) Witnesses shall be first examined-in-chief, then, if the adverse party so desires, cross-examined, then, if the party calling them so desires, re-examined."

There is, therefore, no justification whatsoever in excluding the right of the prosecution to examine witnesses for the defence. The submission of learned counsel for the defence is wrong in law and completely misleading. I am glad to note this morning that learned counsel for the respondent does not oppose the appeal. However, magistrates and judges should be able to expect from members of the bar correct guidance and submission on the law, more particularly so when the magistrate, as in this case, is not qualified in law. It is clear that in this case the learned trial magistrate did not obtain from the defence counsel the assistance which he had a right to expect.

I must hold that the exclusion of the right of cross-examination of defence witnesses from the prosecution has occasioned a complete miscarriage of justice. I, therefore, set aside the order of acquittal and order a retrial before another magistrate.

In conclusion, it may be salutary to all to remind ourselves of the following passage from Crampton J. who, replying to the suggestion that counsel was the mere mouthpiece of his client, said in *R.* v. *O'Connell* (2):—

"Such, I do conceive, is not the office of an advocate. His office is a higher one. To consider him in that light is to degrade him. I would say of him as I would say of a member of the House of Commons — he is a representative, but not a delegate. He gives to his client the benefit of his learning, his talents and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law — he will not wilfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the advocate of an individual, and retained and remunerated (often inadequately) for his valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other licence which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer."

Order of acquittal set aside. Retrial ordered.

Solicitors: *Yeap & Yeap.*

OVERSEA CHINESE BANKING CORPORATION LTD. v. TAN CHENG HOE

[O.C.J. (Ali J.) November 14, 1966]

[J.B. — Originating Summons No. 14 of 1966]

Banks and Banking — Chargee — Application to sell lands belonging to deceased chargor — Whether bank entitled to charge interest on balance owing on the footing of "monthly rests" — National Land Code, 1965, s. 256.

This was an application by the bank as chargee of certain lands for an order to sell these lands charged by one *T* deceased (who died in 1942) under section 256 of the National Land Code. *T* had charged these lands before his death to secure an overdraft account of $30,000 at the rate of 65 cents per $100 *per mensum* with monthly rests, commission and bank charges. In clause 2 of the charge it was provided that "And if, when